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Supreme Court of the United States

OCTOBER TERM, 1954

No. [illegible]

INDIAN TOWING COMPANY, INC., UPPER MISSISSIPPI TOWING CORPORATION, MINNESOTA FARM BUREAU SERVICE COMPANY, UNITED FIREMEN'S INSURANCE COMPANY, PETITIONERS,

vs.

UNITED STATES OF AMERICA

BRIEF ON BEHALF OF PETITIONERS
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 213

INDIAN TOWING COMPANY, INC., UPPER MISSISSIPPI TOWING CORPORATION, MINNESOTA FARM BUREAU SERVICE COMPANY, UNITED FIREMEN'S INSURANCE COMPANY, PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The jurisdiction of Your Honors was invoked in this case because of a decision of the United States District Court for the Eastern District of Louisiana, New Orleans Division, entitled "Indian Towing Co., Inc. et al. vs. United States of America", No. 3667 C. A., and because of a per curiam decree of the United States Court of Appeals for the Fifth Circuit, No. 14,747, 211 Fed. Rep. 2d 866. Your Honors granted a petition for a writ of certiorari on October 14, 1954.

JURISDICTION OF THIS HONORABLE COURT.

The jurisdiction is based squarely upon a statute of the United States and the proper interpretation thereof. This is the Federal Tort Claims Act, Section 1346(b), Title 28, U.S.C. The jurisdiction of this Honorable Court is further predicated upon a decision of this Court, namely, *Elizabeth H. Dalehite, et al vs. United States of America*, 73 Sup. Ct. 956, 346 U.S. 15.

THE FACTS.

This was a suit brought as a civil action under Section 1346(b), Title 28, of U.S.C.A. The action arises out of the grounding of the Tug "NAVAJO" which was towing a barge designated as AS-16 carrying 1204.25 tons of triple super phosphate. The grounding occurred on Chandeleur Island on October 1, 1951. The petition alleges that the grounding was due solely to the failure of the light on Chandeleur Island. The facts can best be stated by quoting paragraphs 7 and 8 of the petition.

> "VII. The failure of the said light was due to the negligence of Chief Petty Officer Stone and other officers and members of the Coast Guard in charge of "aids to navigation', and to the officers of the Coast Guard Cutter SALVIA who failed to properly check said light which works on a sun relay system; that they failed to check the battery and the sun relay system which causes the light to go on, and it is alleged, upon information and belief, that there was a loose connection which could have been discovered

upon proper inspection; that the said officers and other personnel of the Coast Guard on duty in this area had also failed to properly check the light and to make any attempt to repair same with due diligence or to notify mariners using the light for navigation purposes.

"VIII. The said Chief Petty Officer Stone did not, when he checked the lighthouse on September 7, 1951, properly check the connections which were out in the weather; no attempt was made to check the light to see whether it was operating properly between September 7, and October 1, 1951; that, therefore, the said grounding was due solely to the negligence of the Coast Guard in the maintenance and servicing of said light, and its failure to properly maintain the light or to notify vessels that the said light was not functioning."

Suit was originally brought in the Southern District of Mississippi but was transferred to the Eastern District of Louisiana, New Orleans Division. A motion to dismiss was then filed on the basis that the United States of America, had not consented to be sued under the Tort Claims Act for the type of maritime tort set forth in the petition; that, in the alternative, the provisions of the Suits in Admiralty Act, 46 U.S.C.A. or the Public Vessels Act, 46 U.S.C.A. 787, were applicable. The motion was maintained and the petition was dismissed and appellant appealed.

The basis for Federal jurisdiction in the Court of the first instance is the Federal Tort Claims Act and particularly Section 1346(b), Title 28 U.S.C.

THE QUESTION PRESENTED FOR REVIEW

Your Honors are presented with purely a question of law. Was such a claim set forth for relief as comes under the Federal Tort Claims Act? Do petitioners set forth such a claim for relief that the decision in the *Dalehite* case should, as a mere matter of mechanics, decide the case against petitioners.

THE ARGUMENT

Petitioners further aver that there are many cases in the lower courts which sustain petitioners' petition prior to the *Dalehite* case. They are:

Wickman vs. Inland Waterways Corporation, 78 Fed. Supp. 284.

Somerset Seafood Company vs. United States, 193 Fed. 2d 613, decided by the U. S. Court of Appeals for the Fourth Circuit, Judge Dobie as the organ of the Court.

Somerset Seafood Company vs. United States, 98 Fed. Supp. 298, in the lower court, decided by Judge Chestnut.

Lacy vs. United States, 98 Fed. Supp. 219.

State of Maryland, for the use of Pumphrey vs. Manor Real Estate and Trust Co. 176 Fed. 2d 414.

Mid-Central Fish Co. vs. United States, 112 Fed. Supp. 792.

Hernandez vs. United States, 112 Fed. Supp. 369.

Moran vs. United States, 102 Fed. Supp. 275.

The judges' opinion in these cases sustaining petitioners' postion are unanswerable.

Petitioners further aver that they are calling the Court's attention to these cases for the reason that they do not believe it was the intention of this Honorable Court to overrule these cases, and petitioners aver that these cases are still decisive of the case at bar, but petitioners now desire to show this Honorable Court that, instead of being authority for the decisions of the district court and the Court of Appeals in dismissing petitioners' claim, they are authority for denying the motion to dismiss.

Petitioners aver that a reading of the majority opinion rendered by the Honorable Mr. Justice Reed shows that the *Dalehite* case was decided upon one ground and one ground only; that all of the allegations in the plaintiff's petition in that case were based upon a wrongful **DISCRETIONARY ADMINISTRATIVE** action. He says:

> "It is not probable that the courts would extend a Tort Claims Act into the realm of the validity of legislation or discretionary administrative action, but H.R. 6463 makes this specific.
>
> The legislative history indicates that while Congress desired to waive the Government's immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within their scope of business it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function."

in the maintenance and operation of the light by a subordinate officer. It is not based upon the discretion of the Coast Guard in failing to maintain the light. The Coast Guard immediately placed the light in operation again. It is based solely upon an act of negligence on the part of a subordinate officer in the performance of his duties. It clearly does not come under the exception in Sub-section (A) of Article 2680, Title 28, U.S.C.A., wherein it says:

> "* * are based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty * * *."

If the Coast Guard, in its discretion, determined that a light should be established and kept burning, and the light went out because of the negligence of a subordinate officer, then it is liable. It is clearly the intention of Congress that the negligence of any employee of the Coast Guard engaged in a civil function is the basis of a claim against the Government. Subsection (J) excludes "any claim arising out of the combatant activities of the military naval force or the Coast Guard during time of war". This exclusion shows clearly, under every reasonable theory of interpretation, that it was the intention of Congress that the Coast Guard should be liable for the negligence of any employee engaged in a peace time activity.

Petitioners aver that Judge McLaughlin of the United States District Court of Hawaii, in the case of *Hernandez vs. United States, supra*, recognized this distinction. In this case the United States set up a road block at a point

intersecting a roadway of Hickman Field, a United States military air field. The plaintiff was forced to run off the road to avoid hitting the road block. Suit was brought under the Federal Tort Claims Act, alleging negligence on the theory that there were not proper warning signals, sentries or guards or anything else to indicate danger or any notice to travelers or passers along the highway of the road block. The judge said in answer to the argument, that the erection of the road block was a *discretionary function.*

> "Applying the reasoning of the Somerset Seafood Co., Dishman and Costley cases, this Court concludes that exception (a) of Section 2680 is not applicable in this case. It may be assumed arguendo that the erection of a road block is a discretionary function. However, after having exercised its discretion to erect the road block, the Government had the absolute duty to properly and adequately warn passers along the road of the hazard created. There is certainly no discretion not to warn the foreseeable motoring public of the danger ahead. The allegations in the complaint are sufficient to confer jurisdiction on this Court to adjudicate the claim.
>
> "The motion to dismiss is denied."

Petitioners further aver that the following language of Judge Ridge in *Mid-Central Fish Co. vs. United States*, 112 Fed. Supp. 792, shows the correct distinction between the *Dalehite* case and the present case.

> "Although Congress has provided in Section 2674, Title 28, U. S. C. A. that the United States shall be liable 'in the same manner and to the same extent as a private individual under like circumstances,' it is

not thereby meant that federal liability is conditioned upon private liability under identical factual circumstances. Governmental liability may be imposed under the Act, even though private liability could never arise under identical factual situations due to the fact that the tortious discharge of purely sovereign, as distinguished from proprietary, functions is involved. Cf. Federal Crop Ins. Corp. v. Merrill, 332 U. S. 380, 388, 68 S. Ct. 1, 92 L. Ed. 10. The distinction which is to be drawn between legal and factual circumstances existing between the Government and its agents and those existing between the Government and third parties, constitutes the very foundation for the principle that no distinction is to be drawn between sovereign and proprietary functions of Government for purposes of ascertaining governmental liability under the Federal Tort Claims Act. Somerset Seafood Co. v. United States, 4 Cir., 193 F. 2d 631; Cerri v. United States, D. C., 80 F. Supp. 831; also, 'Problems under the Federal Tort Claims Act.' by L. R. Yankwich, United States District Judge for the Southern District of California, 9 F. R. D. 143, 156, (and authorities cited therein)."

Petitioners further aver that this distinction has been recognized by the Court of Appeals for the State of New York and the Supreme Court for the State of Illinois, two courts which are recognized as being outstanding. These cases are: *Johnston vs. City of East Moline*, 405 Ill. 460, 91 N. E. 2nd 401 and *Foley vs. New York*, 294 N. Y. 275, 62 N. E. 2d. 69.

In the *Johnson* case the Court said:

"We do not agree with that statement of law when applied to the facts now before us. By article 7 of

the Vehicle and Traffic Law the Legislature created the State Traffic Commission and prescribed its functions. By section 95-a of that article it is provided that 'The state traffic commission shall have the power and *it shall be its duty* to regulate the type, location, erection, *maintenance* and removal of all traffic control signals and signal lights on or along any state highway maintained by the state, and *every such signal or light shall hereafter* be *maintained at the expense of the state.*' (Emphasis supplied.) The traffic control signal here involved was erected on Union Road, a 'state highway maintained by the state.' It also appears from unreversed findings by the Court of Claims—'That the maintenance of Union Road and the traffic lights on said road were taken over completely by the State of New York and maintained solely by the Department of Public Works Division of highway approximately four years prior to August 4, 1940, the date of the accident herein'; that 'it was the duty of the members of the Police Force of the Town of Amherst while daily touring the road and passing this traffic light to look at it and see if it was working right, and if it was not, to report it to the State Highway Deparment.' If, as has been found by the Court of Claims and the Appellate Division, the State, at the time of the accident here involved, had failed properly to perform the statutory duty it had undertaken to maintain the lights in the traffic control signal on Union Road, we think such breach of duty is made actionable by the State's waiver of immunity from liability declared by section 8 of the Court of Claims Act: 'The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in

accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complied with the limitations of this article.'

"We have had occasion to say that 'By section 12-a (Now §8 of the Court of Claims Act) liability when proved by the rules of law applicable to individuals, has been affirmatively assumed (by the State) and jurisdiction to determine whether such a liability has been proved is conferred upon the Court of Claims.' (Jackson v. State of New York, 261 N.Y. 134, 138; see, also, Holmes v. County of Erie, 291 N.Y. 798; Bloom v. Jewish Board of Guardians, 286 N.Y. 349, 353; Paige v. State of New York, 269 N.Y. 352, 356)." *Foley v. State of New York*, 294 N.Y. 279, 280, 62 N. E. 2d 69.

"There was no statute requiring appellant to construct and maintain automatic signal devices at the intersection in question. (Cahill Illinois Rev. Stat. 1927, chap. 95a, secs. 26 and 33, pars. 27 and 34; Ill. Rev. Stat. 1943, chap. 95½, sec. 30, par 127.) Its action in this connection was voluntary. It had the power to provide for them if in its discretion they were necessary, but it was not required to do so. There is no claim that appellant was negligent in the exercise of its discretion to provide such system, or in the original construction of it. Whether in those matters it was in the exercise of a governmental function or a corporate duty is not therefore, before us. The question of what the city did or permitted at the intersection, in the matter of controlling or not controlling traffic after the northwest standard was removed, is before us, and whether or not its acts and omissions in that regard were in the exer-

cise of a governmental function or a corporate duty must be decided.

"As early as *City of Chicago v. Powers*, 42 Ill. 169, the principle was recognized that where a municipality undertakes to protect a street or bridge by lights it is liable for negligence if it does it in an insufficient manner. In *City of Freeport v. Isbell*, 83 Ill. 440, the same principal is enunciated and the *Powers* case is cited, the court saying with reference to it: 'In the case referred to, the city had lighted a certain bridge where the accident occurred, as well as the street; but the injury arose from the fact that the light furnished by the city was insufficient to afford proper protection.' In the *Isbell* case the city had omitted to light a portion of the street. It was held not liable but the court said: 'In this case, if the City of Freeport, under the power conferred by the charter, had assumed to light the street where the accident occurred, but had exercised the power in a negligent manner, and had failed; in the exercise of the power, to furnish lights sufficient to afford proper security from danger, a different rule would prevail, and the rule announced in the case cited (Powers case) would govern.'

"A municipal corporation acts judicially or exercises discretion when it selects and adopts a plan in the making of public improvements, but as soon as it begins to carry out that plan it acts ministerially, and is bound to see that the work is done in a reasonably safe and skillful manner. *Johnston v. City of Chicago*, 285 Ill. 494; *City of Chicago v. Seben*, 165 Ill. 37; 4 Dillon on Mun. Corp. (5th ed.) sec. 1741.

"A rule determining when a municipality is exercising a public or governmental function as distinguished from a strictly corporate duty is difficult to formulate. It has been said more than once that all that can be done with safety is to determine each case as it arises. See *Johnston v. City of Chicago*, 258 Ill. 494, 497, wherein is cited *Lloyd v. New York*, 5 N.Y. 369, and *Cobb v. Dalton*, 53 Ga. 426. In the *Johnston* case the city was held liable for negligence of a driver of an automobile hired by the library board which was part of the city government and who at the time of the accident was conveying books from one library building to another along the streets of Chicago. On page 497 of that opinion, the court, speaking through Mr. Justice Carter, said: 'It is frequently stated that to determine whether there is municipal responsibility the inquiry must be whether the particular agents or servants for whose acts of negligence it is sought to hold the corporation are its agents and servants for the performance of a public duty imposed by law, or merely for the carrying out of private functions which are for its special benefit or advantage. (Citations).' In the same case it was said that the mere fact that a particular work may incidentally benefit the public does not necessarily exempt the city from liability for torts committed by its employees." *Johnston v. City of East Moline*, 405 Ill. 465-466.

It is most respectfully submitted that the dissent of Chief Justice Massey of the Court of Civil Appeals of the State of Texas, in the case of *Parson vs. Texas City*, 259 S.W. 2d 333, expresses the modern philosophy as to the liability of a sovereign. It expresses the reasons why

Congress enacted the Federal Tort Clause Act as law. He said:

> "The question is one not heretofore passed upon in Texas, and the writer, cognizant of the fact that the modern tendency is to restrict rather than to extend the doctrine of municipal immunity, and subscribing to the principles thereof, believes that correct application of principles of law requires the extension of the corporate obligations of a municipality to this and future situations similarly arising... And this I especially believe should apply when by law of the state a traveler upon city streets is directed by such city's defective mechanical traffic signals into a position of great danger, when the city has had time, after notice of the defect, to correct the condition of hazard thereby created."

Justice Massey, in his dissent, quoted the case of *City of Galveston vs. Posnainsky*, 62 Texas 118, which was decided back in 1884, wherein the following charge to the jury was given:

> "The opening and repairing of streets is a matter of discretion in the city government; but when she undertakes to open or construct streets and travel ways, she must so construct them as to render their use reasonably safe to such persons as are naturally expected to use said ways, using such care as such persons ordinarily exercise."

WHEREFORE, it is respectfully submitted that the per curiam decision of the Court of Appeals for the Fifth Circuit is incorrect, and that it should, therefore, be reversed, and that the matter be remanded for further

hearing, and that the order of the United States District Court for the Eastern District, New Orleans Division, in the cause entitled, *"Indian Towing Company, et al. vs. United States of America"*, No. 3667 on the Civil Docket of that Court, be recalled, and that the case be ordered tried with instructions as to the rights of petitioners under the Federal Tort Claims Act, and particularly Section 1346(b), Title 28 U.S.C.

Respectfully submitted,

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I certify that a copy of the foregoing brief has been served on the Solictor General and upon Paul A. Sweeney, Attorney, Department of Justice by depositing same in a United States Mail Box with air mail postage prepaid this date.

Nov. 1954.

CICERO C. SESSIONS.

APPENDIX "A".

PER CURIAM: Brought under the Federal Tort Claims Act, Sec. 1346(b) Title 28, U.S.C., the suit was for cargo damage from the wetting of the cargo of the Barge AS-16, while in tow of the tug "Navajo", as a result of the grounding of the tug on Chandeleur Island on or about October 1, 1951, "due solely to the failure of the light on the island."

The claim was that the failure of the light was due to the negligence of Chief Petty Officer Slone and other officers and members of the Coast Guard in charge of "aids to navigation" in failing to properly check the light to see whether it was operating properly between September 7th and October 1st, and that the grounding of the tug was due to the negligence of the Coast Guard in maintaining and servicing the light and in not notifying vessels that it was not functioning.

The United States filing a motion to dismiss, the motion was sustained on the authority of *Dalehite v. U. S.*, 346 U.S. 15.

Appealing from the order, appellants are here insisting that the facts alleged as ground for recovery here do not bring the case within the facts of, or the reasons for, the decision in the *Dalehite* case while appellee as vigorously insists that that decision and the decision in the *Feres* case are controling here.

Feres v. United States, 340 U.S. 135.

We are of the clear opinion that this is so, and that, under the principles, governing the liability of the United States under the invoked act, laid down in those cases, the judgment must be affirmed.

AFFIRMED

A True copy:
Teste:

.....
Clerk of the United States Court of
Appeals for the Fifth Circuit.

APPENDIX "B".

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX "C".

Section 1346(b)—Title 28 U.S.C.

"Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."